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Supreme Court, U.S.
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No. 95-1266

In the Supreme Court of the United States

OCTOBER TERM, 1995

GERALD E. ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner, an injured seaman, could not maintain a personal injury action against the United States under the Suits in Admiralty Act, where petitioner's injury was caused by the independent contractor from whom the United States time-chartered the vessel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 63 F.3d 820. The opinion of the district court (Pet. App. 9-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1995. A petition for rehearing was denied on September 27, 1995. Pet. App. 21. The petition for a writ of certiorari was filed on December 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was chief mate aboard the S.S. Santa Adela. The owner of the ship, and petitioner's em-

ployer, was Vessel Charters, Inc. (VCI). During the period at issue in this case, the Santa Adela was time-chartered to the United States. Under the provisions of the charter, VCI hired and was responsible for the crew. The charter expressly stated that it was not a "demise" charter.[1] Pet. App. 2-3.

Petitioner was injured in an accident that occurred while the Santa Adela was moored at Chin Hae, South Korea. While United States officials were supervising the unloading of the ship's cargo, the ship's first assistant engineer was attempting to repair a lifeboat winch. Petitioner and the ship's captain were standing near the lifeboat, conferring on an unrelated matter, when the winch handle flew off and struck petitioner in the head, injuring him. Pet. App. 3.

2. Petitioner brought this suit against the United States under the Suits in Admiralty Act (SAA), 46 U.S.C. 741 *et seq.* Following discovery, the district court granted the government's motion for summary judgment. The court rejected petitioner's contention that, although the charter between VCI and the United States was a time charter, the United States had in fact exercised operational control over the vessel so as to render the government liable for

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[1] Under a "demise" or "bareboat" charter, the vessel owner transfers full possession and control of the vessel to the charterer, who in turn supplies the crew and maintains the vessel. See, *e.g.*, *Reed* v. *The Yaka*, 373 U.S. 410, 412 (1963); *Forrester* v. *Ocean Marine Indem. Co.*, 11 F.3d 1213, 1215 (5th Cir. 1993). Under a time charter, the vessel owner retains primary possession and control over the vessel's operation and provides its own crew and maintenance. See, *e.g.*, *Walker* v. *Braus*, 995 F.2d 77, 80 (5th Cir. 1993); *Forrester*, 11 F.3d at 1215; *Matute* v. *Lloyd Bermuda Lines*, 931 F.2d 231, 235 (3d Cir.), cert. denied, 502 U.S. 919 (1991).

petitioner's injury. The court held that the terms of the charter did not support petitioner's operational control theory (Pet. App. 13), and it rejected petitioner's affidavit evidence as "conclusory" and "not at all on point with the issues in th[e] case." *Id.* at 14, 15. The court further held that evidence that the United States exercised control over the movements and cargo activity of the chartered vessel was consistent with the existence of a time charter and did not create a genuine issue of material fact as to liability, where petitioner's injury was unrelated to cargo activity. *Id.* at 15-16.

The court also rejected petitioner's contention that active negligence by the United States caused petitioner's injury. Observing that the winch repairs that resulted in petitioner's injury were performed by a VCI employee, the court found that petitioner had failed to satisfy the requirement of proximate causation. Pet. App. 16-17.

Finally, the court rejected petitioner's claim that the United States should be held liable because it caused VCI's bankruptcy or negligently selected VCI as a contractor. The court held that, even assuming that the United States had negligently caused VCI's bankruptcy, the government in no way caused petitioner's injury. Pet. App. 17-18.

3. The court of appeals affirmed. The court observed that, under the SAA, petitioner could maintain his personal injury action against the United States if his action could be maintained against a private party under traditional admiralty principles. Pet. App. 3. Under those principles, the court agreed with the district court that the contract between VCI and the United States was a time charter and that the government neither exercised operational control

over the vessel nor was actively negligent with respect to petitioner's injury.

The court held that neither the terms of the charter nor the extrinsic evidence presented by petitioner supported petitioner's theory that the government exercised operational control over the vessel. Pet. App. 4-5. It further concluded that the government's conduct regarding the unloading of the vessel, even if negligent, could not have caused petitioner's injury. *Id.* at 7. Finally, the court held that the government had no legal duty to select a contractor that would not later become insolvent. *Ibid.*

ARGUMENT

1. Petitioner's principal contention is that VCI was "a maritime agent of the United States for purposes of the [SAA], causing the United States to be exclusively liable for [petitioner's] injuries." Pet. 6. Section 745 of the SAA provides that "where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States * * * whose act or omission gave rise to the claim." Accordingly, where a vessel owner or operator is an agent of the United States, Section 745's "exclusivity provision" grants immunity to the agent and allows suits only against the United States. See, *e.g.*, *Petition of the United States*, 367 F.2d 505, 509 (3rd Cir. 1966), cert. denied, 386 U.S. 932 (1967). In this case, there was no evidence that an agency relationship existed between VCI and the United States.

Contractors hired by the United States to perform shipping tasks do not automatically become the government's agents. Rather, an agency relationship

arises only where the contractor is "employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control." *Petition of the United States*, 367 F.2d at 509; see also Restatement (Second) of Agency § 1(1) (1958). In his petition, and before the court of appeals (Pet. 7; Pet. C.A. Br. 30-31), petitioner has predicated his agency theory solely on the statement in clause H30.1 of the charter that "the Vessel is a representative of the U.S. Government and therefore it is important that the operation meets the highest possible standards of appearance and ship smartness." Pet. C.A. App. Vol. 1, Ex. A, Section H30.1. That clause, entitled "Standards of Appearance," relates only to VCI's duty to maintain the physical appearance of the Santa Adela. See *ibid.* ("To this end, the Owner and operator [VCI] will institute a continuous program of Vessel maintenance."). The clause clearly does not create a fiduciary or agency relationship between VCI and the United States.

Contrary to petitioner's contention (Pet. 6-7), the decision below does not conflict with *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949), *Smith* v. *United States*, 346 F.2d 449 (4th Cir.), cert. denied, 382 U.S. 878 (1965), or *Petition of the United States*, *supra*. In each of those cases, the United States owned the vessel at issue, and the language of the agreement between the government and the contractor vested control of the vessel in the United States. See *Cosmopolitan Shipping Co.*, 337 U.S. at 795 ("examination of the terms of the contract and the actual conduct of the parties under this agreement * * * demonstrates that the United States had retained * * * the possession, management, and navigation of the vessel and control of the ship's

officers and crew"); *Smith*, 346 F.2d at 451 ("the relevant portions of the agreement clearly demonstrate that the United States remained in control of the vessel at all times"); *Petition of the United States*, 367 F.2d at 509-510 ("Certainly, under the contract in this case [the contractor] owed the United States obedience and loyalty and was in significant ways subject to the government's direction and control. * * * We think the general sense and specific details of this agreement disclose a relation of principal and agent within the accepted legal conception of an agency relationship.").

Here, the vessel was owned and operated by VCI, and the court of appeals expressly held that "VCI retained operational control of the Santa Adela under the charter." Pet. App. 4; see also *id.* at 12-16. Having so held, the court did not err in declining expressly to address the question of agency. Cf. *Trautman* v. *Buck Steber, Inc.*, 693 F.2d 440, 445 (5th Cir. 1982) (operational control by principal is essential element of agency relationship).

2. *Calmar S.S. Corp.* v. *United States*, 345 U.S. 446 (1953), cited by petitioner (Pet. 5, 13), is also inapposite. *Calmar* involved a suit by a shipowner against the United States for the claimed breach of a charter. There was no question that the United States was the proper defendant. The only issue addressed by the Court was whether the suit could be maintained under the SAA, or whether the shipowner was required to proceed under the Public Vessels Act or the Tucker Act. See *Calmar*, 345 U.S. at 446-448, 454-455.[2]

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[2] Contrary to petitioner's contention (Pet. 7-10), this Court's decision in *Amell* v. *United States*, 384 U.S. 158 (1966), is also

3. Petitioner contends, in essence, that the SAA imposes substantive, strict liability on the United States for any injury suffered by a seaman on a time-chartered ship. *E.g.*, Pet. 11. The rule that petitioner proposes would violate traditional admiralty law principles and contravene the SAA's purpose of limiting the United States' liability to cases in which an admiralty proceeding could be maintained against private parties *in personam*. See 46 U.S.C. 742; *Williams* v. *Central Gulf Lines*, 874 F.2d 1058, 1062-1063 (5th Cir. 1989), cert. denied, 493 U.S. 1045 (1990). As the court below observed (Pet. App. 6-7), so construing the SAA would be "an illogical result which no authority supports and which we cannot conceive of Congress intending absent more explicit language in the statute or some persuasive legislative history."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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inapplicable. The Court in *Amell* held only that the 1960 amendments to the SAA did not preclude federal employees working on government vessels from enforcing certain rights under the Tucker Act.